

# **EXHIBIT C**

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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF (NC)

**CISCO'S MOTION IN LIMINE NO. 3 TO  
EXCLUDE UNTIMELY DISCLOSED  
WITNESSES**

**UNREDACTED VERSION OF  
DOCUMENT SOUGHT TO BE SEALED**

Judge: Hon. Beth Labson Freeman

1 **I. INTRODUCTION**

2 Cisco respectfully moves *in limine* under Fed. R. Civ. P. 26(e) to preclude Arista from  
 3 reliance at trial on witnesses who were not timely disclosed to Cisco. Despite ample opportunity  
 4 throughout more than a year of discovery, Arista waited until weeks *after the close of fact*  
 5 *discovery* to disclose new fact witnesses along with its damages expert's rebuttal report. Arista  
 6 delayed even further, until just two weeks ago, before disclosing an additional fact witness. None  
 7 of these witnesses had been identified in Arista's responses to Cisco's interrogatories. None of  
 8 them had their documents collected, and none of them have been deposed. Arista's undue delay in  
 9 disclosing new witnesses prejudices Cisco, because Cisco cannot properly prepare to cross-  
 10 examine these fact witnesses from Arista at trial. Therefore, pursuant to Federal Rules of Civil  
 11 Procedure 26(a) and 37(c), the Court should preclude these witnesses from testifying at trial, and  
 12 should likewise preclude Arista's experts from relying on conversations with these witnesses.

13 **II. LEGAL STANDARD**

14 Rule 26 of the Federal Rules of Civil Procedure requires that initial disclosures must  
 15 include "the name . . . of each individual likely to have discoverable information . . . that the  
 16 disclosing party may use to support its claims or defenses, unless the use would be solely for  
 17 impeachment." Fed. R. Civ. P. 26(a)(1)(A)(i). Upon learning its initial disclosures are incomplete  
 18 or incorrect, parties must supplement their disclosures "in a timely manner." Fed. R. Civ. P.  
 19 26(e)(1)(A). "If a party fails to . . . identify a witness as required by Rule 26(a) or (e), the party is  
 20 not allowed to use that . . . witness to supply evidence on a motion, at a hearing, or at a trial,  
 21 unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Absent a  
 22 showing that the failure was substantially justified or harmless, "[t]he [Rule 37] sanction is  
 23 *automatic and mandatory.*" *Clear-View Techs., Inc. v. Rasnick*, No. 13-CV-02744-BLF, 2015  
 24 WL 3509384, at \*2 (N.D. Cal. June 3, 2015) (Freeman, J.) (emphasis in original); *see also Yeti by*  
 25 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) ("Rule 37(c)(1) gives  
 26 teeth to these requirements by forbidding the use at trial of any information required to be  
 27 disclosed by Rule 26(a) that is not properly disclosed.").

1 **III. RHONDA ANDREW SHOULD NOT BE PERMITTED TO TESTIFY AT TRIAL**

2 On September 1, 2016, Arista, for the first time, informed Cisco that it intended to call  
3 Rhonda Andrew as a witness at trial, by including her on their trial witness list. A week later, on  
4 September 8, 2016, Arista informed Cisco that the subject matter of her testimony would be:  
5 “Publicly-found ‘Cisco Confidential’ documents. Chart re copyright presumptions; certified  
6 copies of copyright office records.” Jenkins Decl., Exh. 1. Ms. Andrew was never disclosed in  
7 Arista’s initial disclosures. As such, Arista failed to comply with Rule 26(a) and (e), and Ms.  
8 Andrew’s testimony should be excluded unless Arista can show that its failure “was substantially  
9 justified or is harmless.” Fed. R. Civ. P. 37(c)(1). Arista cannot do so here.

10 Arista has not provided any justification for its untimely disclosure of Ms. Andrew, and  
11 Cisco does not know of any. Ms. Andrew is within Arista’s control. The purported subject matter  
12 of her testimony relates to issues that have been a part of this case since its initial filing. Nor can  
13 Arista’s late disclosure of Ms. Andrew be said to be harmless. Cisco had not heard of Ms.  
14 Andrew as a potential witness until September 1, 2016. She had not been disclosed as a person  
15 with relevant knowledge in any of Arista’s responses to Cisco’s interrogatories or in any  
16 depositions. Cisco has not had the opportunity to depose her or to review her custodial  
17 documents. Therefore, she should not be permitted to testify. *See Nortek Air Solutions, LLC v.*  
18 *Energy Lab Corp.*, 2016 U.S. Dist. LEXIS 92468, 11-12 (N.D. Cal. July 15, 2016) (witnesses  
19 disclosed on the last day of discovery were excluded from testifying because the opposing party  
20 did not have the opportunity to depose them or subpoena their documents.)

21 **IV. ANY EVIDENCE DERIVED FROM WITNESSES WHO WERE UNTIMELY**  
22 **DISCLOSED IN MS. ELSTEN’S REBUTTAL REPORT SHOULD BE EXCLUDED**

23 In her rebuttal report, Arista’s damages expert, Cate Elsten, relied on conversations with  
24 eighteen Arista employees who had not been previously disclosed to Cisco. Her rebuttal report  
25 was served on July 13, 2016, more than six weeks after the close of regular fact discovery and  
26 more than four weeks after the close of damages fact discovery. Because the disclosure of these  
27 witnesses occurred after the close of discovery, Cisco was not given the opportunity to depose  
28 these witnesses or to request their custodial documents. Cisco would be prejudiced were Ms.

1 Elsten to rely on her conversations with any of these witnesses, or if these witnesses were  
2 permitted to testify at trial. *See Nortek Air Solutions, LLC v. Energy Lab Corp.*, 2016 U.S. Dist.  
3 LEXIS 92468, 11-12 (N.D. Cal. July 15, 2016) (witnesses disclosed on the last day of discovery  
4 were excluded from testifying because the opposing party did not have the opportunity to depose  
5 them or subpoena their documents.); *see also Icon-IP Pty Ltd. v. Specialized Bicycle Components,*  
6 *Inc.*, No. 12-cv-03844-JST, 2015 WL 1476399, at \*10 (N.D. Cal. Mar. 31, 2015) (expert  
7 precluded from relying on conversations with witnesses when information was not disclosed until  
8 after depositions took place).

9       Moreover, during discovery Arista designated Anshul Sadana, its Senior Vice President of  
10 Customer Engineering, as its 30(b)(6) witness for topics related to lost profits. *See Jenkins Decl.*  
11 *Exhs. 12 and 13.* In particular, Mr. Sadana was Arista's corporate designee for topics related to  
12 communications with Arista's customers about Cisco including sales pitches, Arista's strategies  
13 for competing with Cisco, the relevant market and Arista's market share, Arista's marketing, sales  
14 and revenues for its products, customer preferences, consumer demand, Arista's business plans  
15 and projections. At his deposition, Mr. Sadana stated that he was fully prepared to testify on these  
16 topics based on his work experience and that he had only spoken with two employees from  
17 Arista's "finance team" and Arista's CEO to prepare for the deposition. *Jenkins Decl. Exh. 14 at*  
18 *9:11-10:23.* Thus, in preparation for his 30(b)(6) deposition, Mr. Sadana ***did not speak with*** any  
19 of the eighteen sales engineers that Ms. Elsten spoke with and relied on to form her lost profits  
20 opinions. Mr. Sadana's 30(b)(6) testimony is binding on Arista, and Arista cannot be permitted to  
21 revise or supplement that testimony by having its expert rely on hearsay, off-the-record  
22 conversations with Arista employees who were never even disclosed to Cisco. *See San Francisco*  
23 *Bay Area Rapid Transit Dist. v. Spencer*, 2006 U.S. Dist. LEXIS 73135 (N.D. Cal. Sept. 25, 2006)  
24 ("The answers given by the person designated by the corporation in a Rule 30(b)(6) deposition are  
25 binding on the corporation.")

1           **A. Testimony or Reliance on Conversations with Ariff Premji or Chris Summers**  
 2           **Should Be Excluded**

3           Arista first disclosed witnesses Ariff Premji and Chris Summers to Cisco when they were  
 4           cited as two of the eighteen newly-disclosed sources in Ms. Elsten's Rebuttal Report, served six  
 5           weeks after the close of regular fact discovery. Jenkins Decl. Exh. 8 at 50 and Appendix D at 27.  
 6           On August 1, 2016, two weeks after Ms. Elsten's rebuttal report, Arista served its Sixth  
 7           Supplemental Initial Disclosures, and, for the first time, added the names of Ariff Premji and Chris  
 8           Summers. Jenkins Decl., Exh. 6. Then, on its trial witness list served September 8, 2016, Arista  
 9           again disclosed these two names as witnesses Arista "may call" at trial. Jenkins Decl. Ex 1. Arista  
 10          has presented no reason that it could not have disclosed these witnesses to Cisco earlier. As Cisco  
 11          had no opportunity to depose these witnesses, or to review their documents, Cisco would clearly  
 12          be prejudiced if they were allowed to testify, or if Ms. Elsten is permitted to rely on her  
 13          conversations with them. *See Nortek Air Solutions, LLC v. Energy Lab Corp.*, 2016 U.S. Dist.  
 14          LEXIS 92468, 11-12 (N.D. Cal. July 15, 2016). Therefore, the Court should exclude any  
 15          testimony from these two witnesses at trial and should strike the portions of pages 50, 76 and  
 16          Appendix D of Ms. Elsten's Rebuttal report and not allow Ms. Elsten to rely on conversations  
 17          with these witnesses.

18           **B. Ms. Elsten Should Be Precluded From Relying on the 16 Other Arista**  
 19           **Employees Who Were Not Timely Disclosed**

20          In addition to the two witnesses discussed above, Ms. Elsten relied on conversations with  
 21          sixteen previously undisclosed witnesses in forming the opinions in her rebuttal report: John  
 22          Peach, Scott Geba, Vipul Chib, Narayanan Suryanarayanan, Chris Kane, Michael Francini, Stuart  
 23          Munro, Yajian (YJ) Huang, Nick Ciarleglio, Ashwin Kohli, Jia Chen, Edmund Roche-Kelly,  
 24          Kulin Shah, Amanda Wheaton, Ita Brennan, and Liz Stine. Jenkins Decl., Exh. 7, 8. Ms. Elsten  
 25          should not be permitted to rely on the conversations with these witnesses, because they were not  
 26          disclosed to Cisco, and Cisco did not have an opportunity to depose them or determine whether  
 27          they possess information that is relevant to this case. *See Icon-IP Pty Ltd. v. Specialized Bicycle*  
 28          *Components, Inc.*, No. 12-cv-03844-JST, 2015 WL 1476399, at \*10 (N.D. Cal. Mar. 31, 2015)

(expert precluded from relying on conversations with witnesses when information was not disclosed until after depositions took place). Therefore, the Court should strike the portions of Ms. Elsten's report that rely on the conversations with these untimely disclosed witnesses on pages 21, 50, 67-73, 75-77, 89-90, and Appendix D. The Court should also preclude Ms. Elsten from testifying as to any conversation with those witnesses.

## V. CONCLUSION

For the foregoing reasons, Cisco respectfully requests that the Court exclude the untimely disclosed theories, opinions and witnesses as described in this Motion.

Dated: September 16, 2016

Respectfully submitted,

/s/ John M. Neukom

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